BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of	)	
	)	
Alaska Communications Services' Petition for	)	WC Docket No. 17-181
Ruling that General Communications Inc. be	)	
Treated as the Incumbent Local Exchange	)	
Carrier in the ACS of Anchorage, LLC Study	)	
Area Pursuant to Section 251(h)(2) of the	)	
Communications Act	)	

COMMENTS OF THE AMERICAN CABLE ASSOCIATION IN RESPONSE TO THE PUBLIC NOTICE

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EXECUTIVE SUMMARY

In its Petition, Alaska Communications Systems Group, Inc. ("ACS") asserts that the Commission should treat General Communications Inc. ("GCI") as the incumbent local exchange carrier ("ILEC") in the ACS of Anchorage, LLC study area because GCI has more customers and facilities than ACS. ACS is wrong both as a matter of policy and law, and the Commission should dismiss the Petition expeditiously before ACS's erroneous views of Section 251 of the Communications Act encourage others to file similarly baseless requests to impose unwarranted regulatory obligations on their competitors. The Commission's response to the ACS Petition has the potential to impact competition in both the Anchorage study area and across the country. As a result, the Commission should not only deny the ACS Petition on its merits, but also establish a high bar for future Section 251 requests seeking to impose incumbent obligations on competitors requiring the requestor to demonstrate that a competitor has exclusive monopoly-like status and exceptionally dominant and durable control of the market. This high bar will ensure that the Commission exercises its Section 251 authority to treat a competitive carrier as an ILEC only when necessary to encourage or maintain competition in a market.

As explained below, the ACS Petition is contrary to basic economic and competition principles which do not punish carriers for achieving success when they do not exercise a government-sanctioned monopoly right (or its equivalent) and dominate markets such that they can raise prices free from competitive pressures. Subjecting competitive carriers like GCI to price regulation and other ILEC obligations runs counter to decades of U.S. competition policy as well as the deregulatory goals embodied in Commission precedent and the 1996 Telecommunications Act. Such regulation will discourage competitive carriers from further investment to upgrade and expand their infrastructure to provide new services at lower prices in underserved areas like Alaska. Beyond its detrimental policy implications, the ACS Petition also fails to show that GCI meets any of the criteria for ILEC treatment under Section 251.

Specifically, the ACS fails to demonstrate that: (1) GCI occupies a position in the market for telephone exchange service in the study area "comparable" to monopoly-wielding incumbent carriers at the time of the 1996 Telecommunications Act; (2) GCI "substantially replaced" ACS as the incumbent provider in the study area; or (3) treating GCI as an ILEC will further the public interest in competition or the deregulatory goals of Section 251. ACS's position that competitive carriers should be treated as ILECs so long as they provide similar services and hold similar market shares as existing incumbents also will lead to the nonsensical result of the Commission treating multiple carriers as ILECs in highly competitive markets and require the Commission to actively monitor and intervene as carriers gain and lose market share.

Section 251 is not a tool for micromanaging the regulatory obligations of carriers in competitive markets. If ACS believes it should no longer be regulated as an ILEC in the study area, it should request such relief from the Commission through a petition for forbearance instead of asking the Commission to punish one of its competitors for its success. The Commission therefore should deny the ACS Petition and send a clear signal that it will not be used as a "competitive cudgel" to punish competitive carriers for their diligence and innovation.

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COMMENTS OF THE AMERICAN CABLE ASSOCIATION
IN RESPONSE TO THE PUBLIC NOTICE

I. INTRODUCTION

The American Cable Association ("ACA")[1] hereby provides comments in response to the Public Notice by the Federal Communications Commission ("Commission")[2] on a petition filed by Alaska Communications Systems Group, Inc. ("ACS") requesting that the Commission rule that General Communications Inc. ("GCI") or its relevant subsidiary be treated as the incumbent local exchange carrier ("ILEC") in the ACS of Anchorage, LLC study area pursuant to Section 251(h)(2) of the Communications Act of 1934, as amended ("Communications Act").[3] The ACS Petition

1 ACA represents approximately 750 smaller cable operators and other local providers of broadband Internet access, voice, and video programming services to residential and commercial customers. General Communications Inc. is an ACA member.

2 *Pleading Cycle Established for Comments on Alaska Communications Services' Petition for Ruling that General Communications Inc. be Treated as the Incumbent Local Exchange Carrier in the ACS of Anchorage, LLC Study Area Pursuant to Section 251(h)(2) of the Communications Act*, WC Docket No. 17-181, Public Notice, DA 17-658 (July 7, 2017).

3 *Petition For Ruling That General Communication, Inc. Be Treated As the Incumbent Local Exchange Carrier In the ACS of Anchorage, LLC Study Area Pursuant to Section 251(h)(2) of the Communications Act*, Alaska Communications Services Petition for Ruling Under Section 251(h)(2) of the Communications Act (June 23, 2017) ("ACS Petition").

asserts that the 1996 Telecommunications Act[4] "anticipated that a competitor one day would take the place of the 'incumbent' for purposes of Section 251" and therefore, because GCI has 'more customers and more facilities than ACS of Anchorage, GCI is better situated to be treated as the ILEC for purposes of Section 251."[5]

From the perspective of ACA and its many hundreds of competitive providers, the ACS Petition is about more than ACS seeking to subject GCI to the obligations of an incumbent in the Anchorage market. Rather, there is the potential that, in addressing ACS's request, the Commission may establish rules that could, under certain conditions, turn a competitive provider in any market into an incumbent and thereby encourage the filing by ILECs of a raft of petitions. Accordingly, because the stakes are so great, ACA believes the Commission should not only deny the ACS Petition because of the many flaws set forth in these comments, but, in doing so, establish a very high bar for any future request seeking to impose Section 251 incumbent obligations on a competitive provider by requiring that any plea to impose incumbency on a competitor must demonstrate that the competitor has exclusive monopoly-like status and exceptionally dominant and durable control of the market.

As discussed at length herein, the ACS Petition is contrary to basic economic and competition principles whereby entities are not subjected to regulation as a result of achieving success in a market without use of a government-sanctioned monopoly right and an incumbent with a monopoly right is deregulated when its power wanes sufficiently. The Commission has adhered to these principles for four decades and they are embodied in the 1996 Telecommunications Act, which codified Section 251. Should the Commission grant ACS's

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4 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 *et seq*. ("1996 Telecommunications Act").

5 ACS Petition, Executive Summary at ii.

request, it would punish GCI for its diligence and innovation, achieved with no government protection from competition, and reward ACS for its lack thereof or even due to ineptitude.

The ACS Petition also is wrong on the law. Nothing in Section 251 compels the Commission to act affirmatively, or even indicates the Commission should act, to make a competitive provider an incumbent when competition develops. Specifically, nothing in the "comparable" position standard in Section 251(h)(2) turns a competitive provider into an "incumbent" solely by virtue of it having a larger share of the facilities or services in a market than an ILEC. Such an erroneous interpretation would result in the Commission imposing regulatory burdens on a competitive provider in a robustly competitive market. Rather, an "incumbent" can only be defined in terms of the status of an ILEC at the time the 1996 Telecommunications Act was passed – that is, it must have a government-sanctioned monopoly right (or the equivalent should one exist) and must have an overwhelmingly dominant presence in the market such that it can raise prices free from competitive pressures.

ACS's request also is nonsensical. If its proposed interpretation of the "comparability" requirement is followed to its logical conclusion, it would result in multiple competitive providers being deemed incumbents in the same area when they provide similar services or hold similar market shares as the existing incumbent. It also would force the Commission to constantly intervene to shift regulatory obligations as competitors gain and lose market share.

In effect, by seeking to impose incumbent regulatory obligations on GCI, ACS wants to use the Commission as a "competitive cudgel" to gain an advantage over GCI and effectively any competitor it faces. Moreover, unless the Commission upholds the stringent Section 251(h)(2) standards for treating competitive carriers as ILECs and dismisses the ACS Petition, it will invite other incumbents to file similarly baseless petitions seeking to impose unwarranted regulatory obligations on their competitors. Accordingly, the Commission should dismiss the ACS Petition expeditiously and send a clear signal that it would deny similar requests in all but

the most exceptional instances – where a competitor has a *de jure* or *de facto* monopoly right and has a long term exclusive "lock" on the market. The Commission should not permit ACS's erroneous views of competition and the law to infect markets and providers throughout the U.S.

II. THE ACS PETITION RUNS COUNTER TO U.S. COMPETITION POLICY

U.S. competition (antitrust) policy is based on providing incentives for firms to invest and innovate. A fundamental maxim of competition policy is that a firm that attained its market position, even monopoly, through legitimate means should not face restrictions on the price it may charge or other economic terms of its offerings. As Judge Learned Hand wrote in the landmark *Alcoa* decision: "A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry. . . . The successful competitor, having been urged to compete, must not be turned upon when he wins."[6]

In the realm of telecommunications policy, the application of this economic principle supports confining price or other related regulation to services offered over network facilities that were largely funded and deployed under a monopoly-franchise regime, and exempting services offered over facilities funded and deployed with no regulatory protection from competition. The main cost component of facilities used by ILECs is the last-mile copper lines connecting their central offices to customer locations (the added cost of electronics and interoffice transport, if needed, is relatively small). Funding of this legacy copper infrastructure was largely made under a monopoly franchise regime, with a guaranteed return on investment *(i.e.*, low investment risk). The government gave out exclusive franchise rights to telephone companies

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6 *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945) ("*Alcoa*"). This principle was affirmed by the Supreme Court in its 2004 *Trinko* decision. *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth.").

and then these companies made private investments knowing they had monopolies. By contrast, non-incumbent providers never had monopoly franchises for telecommunications services and incurred (and are incurring) substantial investments to deploy facilities to customers, notably by constructing dedicated fiber lines without any guaranteed return or implied protection from competition.

A compelling reason, therefore, to avoid price regulation of non-incumbents is to preserve their incentives to invest in and deploy facilities over which to provide higher performance and more innovative services. Subjecting non-incumbents to any form of price regulation, including mandated resale of services or sharing of facilities at regulated rates or cost-based interconnection, can undermine such incentives. Moreover, the benefit of the new entrant's services are considerable, providing value and another option to consumers while disciplining the ILEC's prices. Rate or other similar regulation of non-incumbents would undermine these benefits and run counter to U.S. competition policy.

III. THE ACS PETITION RUNS COUNTER TO DECADES OF FCC ACTION TO DEVELOP AND SUSTAIN COMPETITION

For decades, the Commission has adhered to the sound economic principle discussed above and consistently adopted regulatory frameworks in non-competitive markets that target the dominant, incumbent provider for oversight and then forbear from such regulation of the provider when competition develops. These frameworks leave competitive providers free from regulation or, at most, subject to a much lighter regulatory burden, where any possibility of rate regulation would only occur via a Commission adjudication in response to a complaint with evidence demonstrating the provider acted unjustly or unreasonably under Sections 201 or 202 of the Communications Act.[7] The Commission has recognized that such frameworks represent the best policy choice to create the most promising environment for a competitive market to

[7] 47 U.S.C. §§ 201-202.

emerge and be sustained.[8] The goal of these regulatory frameworks is the eventual elimination of the need for regulation of the dominant, incumbent carrier once vibrant competition emerges and the dominant player's power is eroded. In contrast, imposing regulation on competitive providers, when only the ILEC exercises meaningful market power derived from a monopoly grant, frustrates investment and innovation by the competitive providers. The Commission's focused approach has proven to be a remarkable success as the communications marketplace today is largely and increasingly characterized by competition among a wide variety of providers.[9] Moreover, by applying the dominant provider approach consistently, the Commission has created potent incentives for future investment, as providers have come to rely on a business environment where their investments will not be undermined by dramatic regulatory shifts.

The *1980 Competitive Carrier Order* archetypally illustrates the Commission's embrace of a regulatory framework where incumbent providers continued to be subject to strict regulatory oversight while new entrants were subject to minimal regulatory burdens.[10] Prior to this order, a single set of rules designed to curb the monopoly power of incumbent providers applied to all participants in the interstate telecommunications market. The Commission, however, found these rules inapt for new entrants and modified its regulatory paradigm to "allow these [entrant] companies and the overall telecommunications industry to satisfy consumer demands more

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8 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15499, ¶ 21 (1996) ("We consider it vitally important to establish a pro-competitive, deregulatory national policy framework.") (internal quotations omitted) ("*Local Competition Order*").

9 *Business Data Services in an Internet Protocol Environment et al.*, WC Docket No. 16-143 *et al.*, Report and Order, 32 FCC Rcd 3459, ¶ 5 (2017) ("To a large extent . . . the competition envisioned in the Telecommunications Act of 1996 (1996 Act) has been realized.").

10 *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, First Report and Order, 85 FCC 2d 1 (1980) ("*1980 Competitive Carrier Order*").

effectively than the undifferentiated set of rules theretofore applied."[11] Those carriers classified as dominant (*i.e.*, incumbents) with market power enabling them to control prices, continued to be subject to traditional federal regulatory requirements while non-dominant carriers were subject to a streamlined regulatory regime to allow them to better respond to competitive pressures.[12]

Since the *1980 Competitive Carrier Order*, the Commission has proceeded to reduce many of the dominant carrier regulations, as well as further eliminate or streamline the regulation of non-dominant carriers (*e.g.*, by eliminating tariff requirements of interexchange carriers altogether and making tariffs permissive but not mandatory for competitive local exchange carriers).[13] The net effect of this overall reduction in regulatory obligations is to leave only the most basic requirements on competitive carriers – *e.g.*, adherence by means of complaint enforcement of the Section 201 and 202 unjust or unreasonable discrimination prohibition. Germane to the current proceeding, for more than three decades the Commission

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11 *Id.* at ¶ 9.

12 *Id.* at ¶¶ 27, 56.

13 *See, e.g.*, *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 245(g) of the Communications Act of 1934, as amended*, CC Docket No. 96-61, Order on Reconsideration, 12 FCC Rcd 15014 (1997); *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended*, CC Docket No. 96-61, Second Order on Reconsideration and Erratum, 14 FCC Rcd 6004 (1999); *Domestic, Interexchange Carrier Detariffing Order Takes Effect*, CC Docket No. 96-61, Public Notice, 16 FCC Rcd 3688 (2000); *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended*, CC Docket No. 96-61, Order, 15 FCC Rcd 22321 (2000) (requiring detariffing of interstate, domestic, interexchange service of non-dominant interexchange carriers); *Hyperion Telecomms. Inc. Petition for Forbearance et al.*, CC Docket No. 97-146, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 12 FCC Rcd 8596 (1997) (granting permissive detariffing for competitive local exchange carriers for the provision of interstate exchange access services); *Reporting Requirements for U.S. Providers of Int'l Telecomms. Servs. Et al.*, IB Docket No. 04-112, First Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 7274 (2011) (eliminating international circuit addition reports); *2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules et al.*, CC Docket No. 00-175 *et al.*, Report and Order and Memorandum Opinion and Order, 22 FCC Rcd 16440 (2007) (eliminating dominant carrier regulation for AT&T, Qwest, and Verizon provision of in-region, interstate, long distance service).

has not seen fit to increase the regulatory burdens of non-dominant carriers, but instead has radically reduced them.

In addition, because the ACS Petition seeks to subject GCI to the additional regulatory obligations imposed on incumbents under Section 251, it is worth noting the Commission's decisions in the *Expanded Interconnection Proceedings*[14] of the early 1990s, where it found many benefits in requiring Tier 1 local exchange carriers ("LECs") to offer expanded interconnection[15] and where it implemented a differentiated regulatory regime subjecting dominant, incumbent carriers to regulatory obligations while exempting their competitors from the rules.[16] Two years later, the Commission eliminated the physical collocation mandate and substituted a more liberal virtual collocation mandate in response to the D.C. Circuit's *vacatur* of certain portions of the 1992 *Expanded Interconnection Order*.[17] Consistent with the paradigm of the *Expanded Interconnection Order*, however, the virtual collocation mandate applied only to Tier 1 LECs because those carriers were "dominant carriers and control facilities to which other parties need access in order to provide service."[18] The Commission again explicitly considered and refrained from imposing the regulation on non-Tier 1 carriers which "lack market power and do not control bottleneck facilities."[19]

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14 *See Expanded Interconnection with Local Tel. Co. Facilities*, CC Docket No. 91-141, Memorandum Opinion and Order, 9 FCC Rcd 5154 (1994) ("*Virtual Collocation Order*"); *Expanded Interconnection with Local Tel. Co. Facilities et al.*, CC Docket No. 91-141 *et al.*, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369 (1992) ("*Expanded Interconnection Order*") (together, the "*Expanded Interconnection Proceedings*").

15 *Virtual Collocation Order* at ¶ 3.

16 *Expanded Interconnection Order* at ¶ 1. NECA pool members were excluded from the mandatory expanded interconnection requirement. *Id.* at ¶ 57.

17 *Virtual Collocation Order* at ¶¶ 2-3.

18 *Id.* at ¶ 105.

19 *Id*.

As discussed below, the landmark 1996 Telecommunications Act confirmed the economic validity of the Commission's three-step approach to creating and sustaining competitive markets: (1) focus on regulating incumbent carriers; (2) eschew regulation of competitive providers; and (3) when competition develops, deregulate incumbent carriers. Numerous Commission actions post-1996 Telecommunications Act carried out this regulatory philosophy. At no point did the Commission, even if it did not find the markets in question sufficiently competitive to forbear from regulating the dominant carriers, consider extending regulation to other competitors.[20] Notably, this was the case even when one competitor, such as the cable provider, was the principal focus of the Commission's inquiry if the ILEC faced sufficient competition to justify forbearance.[21]

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[20] As ACS acknowledges in its Petition, the Commission has rarely imposed ILEC obligations on a carrier under Section 251(h)(2) in the more than 20 years since the passage of the 1996 Telecommunications Act and has *never* before treated a carrier as an ILEC at the request of one of its competitors. ACS Petition at 3. *See Treatment of the Guam Tel. Auth. and Similarly Situated Carriers as Incumbent Local Exch. Carriers under Section 251(h)(2) of the Communications Act*, CC Docket No. 97-134, Report and Order, 13 FCC Rcd 13765, ¶¶ 2-3 (1998) (stating that the Public Utilities Commission of the Territory of Guam asked the Commission to clarify whether GTA was an ILEC) ("*GTA Order*"); *Petition of Mid-Rivers Tel. Coop. Declaring it to be an Incumbent Local Exch. Carrier in Terry, Mo. Pursuant to Section 251(h)(2)*, WC Docket No. 02-78, Report and Order, 21 FCC Rcd 11506, ¶ 4 (2006) (stating Mid-Rivers filed the petition seeking treatment as an ILEC) ("*Mid-Rivers Order*"). *See also Petition of Channel Islands Tel. Co. for Order Declaring it an Incumbent Local Exch. Carrier in the Channel Islands, CA Pursuant to Section 251(h)(2) of the Communications Act of 1934, as amended and Section 51.223(b) of the Commission's Rules*, WC Docket No. 08-123, Order, 26 FCC Rcd 17024, ¶ 2 (2011) (rejecting request from carrier to be designated as an ILEC) ("*Channel Islands Order*").

[21] *See, e.g.*, *Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, Memorandum Opinion and Order, 25 FCC Rcd 8622 (2010); *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, WC Docket No. 05-281, Memorandum Opinion and Order, 22 FCC Rcd 1958 (2007); *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 USC §160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Servs., and for Forbearance from Title II Regulation of Its Broadband Servs., in the Anchorage, AK, Incumbent Local Exch. Carrier Study Area*, WC Docket No. 06-109, Memorandum Opinion and Order, 22 FCC Rcd 16304 (2007), *petitions for recon. pending*; *Petitions of Verizon Tel. Cos. for Forbearance Pursuant to 47 USC §160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metro. Statistical Areas, Inc.*, WC Docket No. 06-172, Memorandum Opinion and Order, 22 FCC Rcd 21293 (2007), *remanded*, *Verizon Tel. Cos. v. FCC*, 570 F.3d 294 (D.C. Cir. 2009); *Petitions of Qwest Corp. for Forbearance Pursuant to 47 USC §160(c) in the Denver, Minneapolis-St. Paul,*

In sum, the Commission has a long history of following the sound economic policy approach of refraining from subjecting non-incumbents to price regulation, thereby avoiding such "uneconomic" outcomes. Instead, the Commission has focused on "dominance" to regulate the rates of the legacy monopoly provider and then to determine when that provider has lost enough of its pricing discretion due to competition so as to warrant relaxation of its price regulation.[22] The Commission thus has recognized that subjecting competitive providers to price regulation would discourage them from undertaking investments needed to upgrade and expand their infrastructure to provide new and innovative services at competitive prices, surely a perverse outcome. The Commission has no economic basis to regulate the rates of non-incumbents and should not to do so now.

IV. THE ACS PETITION RUNS COUNTER TO THE 1996 TELECOMMUNICATIONS ACT'S OBJECTIVES TO FACILITATE ENTRY AND THEN DEREGULATE

The flaws in ACS's request to the Commission to declare GCI an incumbent are further demonstrated by examining Congress's objectives in passing the 1996 Telecommunications Act

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Phoenix, and Seattle Metro. Statistical Areas, WC Docket No. 07-97, Memorandum Opinion and Order, 23 FCC Rcd 11729 (2008), *motion for voluntary remand granted*, *Qwest Corp. v. FCC*, No. 08-1257 (D.C. Cir Aug. 5, 2009).

22 The policy in the United Kingdom ("UK") is instructive. In its 2016 decision regarding Business Data Services ("BDS") competition and regulation, the UK regulator, OFCOM, found that the incumbent's (BT) most important competitor is a cable TV operator, Virgin Media. Despite Virgin Media's high market shares for certain BDS in certain areas and high market concentration levels, OFCOM did not impose obligations on Virgin Media. *See* Business Connectivity Market Review – Final Statement, OFCOM, ¶ 3.54 ("Out of BT's rivals, Virgin Media owns and operates the largest physical network, with its network connecting at least one large business in [REDACTED]% of UK postcode sectors."); Table 4.4 (reporting Virgin Media's shares above 50% for Very High Bandwidth ("VHB") Contemporary Interface Symmetric Broadband Origination ("CISBO") services in Central Business Districts ("CBDs") outside London and in the Rest of UK as a whole); ¶ 4.554 ("In the RoUK [Rest of UK], BT's share of CISBO services is very high (57%) and the market is very concentrated, with BT and Virgin holding a combined share of 88%, and no CP apart from Virgin Media gaining a share of more than 5%."); Figure 1.1 (the only two companies deemed to have Significant Market Power ("SMP") and, hence, candidates for ex ante regulatory remedies, are BT and KCOM, the historical telephone incumbent in the city of Hull); and ¶ 1.10 (a finding of SMP in the relevant product and geographic market is a precondition for imposing ex ante regulation on that communications provider) (Apr. 28, 2016), available at http://stakeholders.ofcom.org.uk/consultations/bcmr-2015/final-statement/ (last visited August 7, 2017).

and codifying Section 251. In reporting the Telecommunications Competition and Deregulation Act of 1995, which was the foundation of the 1996 Telecommunications Act and which established incumbent interconnection, unbundling, and related obligations, the Senate Committee on Commerce, Science, and Transportation explained that the purpose of this legislation was "to provide a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."[23] The Committee adopted these objectives because "[r]educing regulation of the telecommunications industry will spur the development of new technologies and increase investment in these industries, which will create jobs and greater choices for consumers."[24]

The House counterpart legislation similarly sought to end the government's reliance on "heavily regulated monopolies to provide communications services," and instead promote competition and reduce regulation "to secure lower prices and higher quality services" and "encourage the rapid development of new telecommunications technologies."[25] More specifically, in addressing local telecommunications markets, the House Committee explained that "for much of the past 60 years, the provision of local telephone service has been a monopoly service," that ILECs possess "government-sanctioned-monopoly status," and that the

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23 Telecommunications Competition and Deregulation Act of 1995, Report of the Committee on Commerce, Science, and Transportation on S. 652, U.S. Senate, S. Rept. 104-23, at 1-2 (March 30, 1995). *See also id*. at 5 ("The bill gives the FCC greater regulatory flexibility by permitting the FCC to forbear from regulating carriers when it is in the public interest. This provision will allow the FCC to reduce the regulatory burdens on new entrants. It will also permit the FCC to reduce the regulatory burdens on the telephone company when competition develops.").

24 *Id*. at 9.

25 Communications Act of 1995, Report of the House Committee on Commerce on H.R. 1555, U.S. House of Representatives, H. Rept. 104-204, Part 1, at 47 (July 24, 1995).

legislation "reflects the Committee's belief that more competition, rather than more regulation, will benefit all consumers."[26]

The final Conference Report on the legislation echoed the objectives set forth in the reports from the Senate and House that its aim was "to provide for a pro-competitive, de-regulatory national policy framework" to accelerate private sector deployment of advanced telecommunications, information technologies, and other services.[27] In sum, nowhere in the legislation leading up to the 1996 Telecommunications Act did Congress indicate that it wanted to "turn back the clock" and impose regulation once competition developed. Rather, the statute followed the established and sound economic principles of imposing regulation only on the ILEC and only until competition developed.

V. THE ACS PETITION'S INTERPRETATION OF SECTION 251(H)(2) IS ERRONEOUS

The ACS Petition not only runs counter to longstanding U.S. competition policy and the deregulatory objectives embodied in Commission precedent and the 1996 Telecommunications Act, it also misconstrues the criteria for treating competitive carriers as ILECs under Section 251(h)(2).

ACS claims that because GCI provides the same or similar services as ACS, holds a larger market share than ACS, and offers more advanced services than ACS over a network that competitors may wish to access, the Commission must treat GCI as an ILEC in the study area.[28] But nothing in Section 251(h)(2) requires the Commission to treat a competitive carrier as an ILEC, even when the carrier may have surpassed an incumbent in market share and service offerings. Instead, the Commission's authority is discretionary and limited: it "may, by

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26 *Id*. at 49-50.

27 "Joint Explanatory Statement of the Committee of the Conference," Telecommunications Act of 1996, Conference Report, H. Rept. 104-458, at 113 (Jan. 31, 1996).

28 ACS Petition at 10-17.

rule" treat a competitive carrier as an ILEC, but only if that carrier meets the statutorily specified criteria.[29] Recognizing the discretionary nature of its authority, the Commission has repeatedly refused to adopt a "general rule" triggering potential ILEC treatment for a competitive carrier just because the carrier has market power or operates critical exchange facilities in an area.[30] The Commission's Section 251(h)(2) analysis instead proceeds "on a case-specific basis" and requires petitioners to surmount a high evidentiary bar.[31] Specifically, the Commission "will not impose incumbent LEC obligations on non-incumbent LECs *absent a clear and convincing showing* that the LEC occupies a position in the telephone exchange market comparable to the position held by an incumbent LEC, has substantially replaced an incumbent LEC, and that such treatment would serve the public interest, convenience, and necessity and the purposes of section 251."[32]

As discussed below, the ACS Petition makes no showing, let alone a "clear and convincing" showing, justifying the treatment of GCI as an ILEC. Moreover, by any measure, it cannot make such a showing and meet the legal requirements of Section 251(h)(2) because there is no indication that GCI is occupying a position in the Anchorage market that is comparable in any way to that of an incumbent carrier. To be deemed comparable to an incumbent requires much more than a demonstration that a competitor has a majority share by

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29 47 U.S.C. § 251(h)(2).

30 *GTA Order* at ¶¶ 7, 9 (declining to "adopt a general rule under section 251(h)(2) treating as incumbent LECs all members of a class or category of LECs" despite the fact that a LEC may "possess[] market power in its local exchange service area and control over bottleneck local exchange facilities."). *See Local Competition Order* at ¶ 1248 ("[W]e decline to adopt specific procedures or standards for determining whether a LEC should be treated as an incumbent LEC.").

31 *Petition of Mid-Rivers Tel. Coop., Inc. for Order Declaring it to be an Incumbent Local Exch. Carrier in Terry, Mo. Pursuant to Section 251(h)(2)*, WC Docket No. 02-78, Notice of Proposed Rulemaking, 19 FCC Rcd 23070, ¶ 18 (2004) ("*Mid-Rivers NPRM*")

32 *Local Competition Order* at ¶ 1248 (emphasis added). *See Mid-Rivers Order* at ¶ 6, n. 22 (stating "clear and convincing showing" that carrier meets the statutory criteria is necessary to impose ILEC regulatory obligations under Section 251(h)(2)); *Channel Islands Order* at ¶ 6, n. 27 (same).

service offerings in a market. Rather, an incumbent can only be viewed through the lens of the Congress in enacting the 1996 Telecommunications Act – that is, it must be a carrier that through an exclusive right has a monopoly presence in a market, including by having virtually all of the facilities and by locking up service to virtually all of the consumers. In ruling against ACS, the Commission should take the opportunity to make clear that this exceptionally high bar must be surmounted to treat a competitive carrier as an ILEC under Section 251(h)(2). By doing so, the Commission will further its pro-competitive objectives, including by providing significant incentives for providers to invest and deploy advanced broadband networks.

A. GCI Does Not Occupy a Position in the Market for Telephone Exchange Service "Comparable" to an Incumbent Carrier at the Time of the 1996 Telecommunications Act

GCI does not occupy a position "in the market for telephone exchange service"[33] within an area that is "comparable" to the position occupied by incumbent carriers at the time of the 1996 Telecommunications Act.[34] ACS states that GCI "occupies a comparable position to that

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33 ACS states that GCI offers a "greater variety of services and service bundles than ACS," including Voice over Internet Protocol ("VoIP") and other broadband-based services. ACS Petition at 8. ACS argues that the Commission should consider CGI's VoIP and broadband offerings as part of the "market for telephone exchange service" because these services "reasonably can be considered a substitute for such exchange-level ILEC telephone service." *Id.* at 6. But while the Commission has referenced competitive carriers providing more advanced services than the ILEC in an area, it has never designated a carrier as an ILEC under Section 251(h)(2) based on anything other than an analysis of the carrier's local exchange and exchange access services. *See Treatment of the Guam Tel. Auth. and Similarly Situated Carriers as Incumbent Local Exch. Carriers under Section 251(h)(2) of the Communications Act*, CC Docket No. 97-134, Declaratory Ruling and Notice of Proposed Rulemaking, 12 FCC Rcd 6925, ¶ 6 (1997) (discussing GTA's provision of local exchange and exchange access services in the territory) ("*GTA NPRM*"); *Mid-Rivers Order* at ¶¶ 3, 12 (recognizing that Mid-Rivers offered advanced services not provided by the ILEC, including DSL, interactive TV, and custom local area signaling services, but basing its decision to treat Mid-Rivers as an ILEC on its "position in the market for local exchange service"). Expanding the scope of the relevant market also ignores the context of the 1996 Telecommunications Act, which sought to "open[] the local exchange and exchange access markets to competitive entry." *Local Competition Order* at ¶ 3. Although ACA agrees with ACS that consumers continue to abandon legacy wireline telephone exchange service for more advanced offerings, the statutory scope of Section 251(h)(2)'s market analysis remains limited to a carrier's local exchange and exchange access services.

34 47 U.S.C. § 251(h)(2)(A).

of ACS of Anchorage in the ILEC study area of Anchorage, providing the same or reasonably substitutable services, and more, to the vast majority of locations in the study area."[35] ACS further states that GCI provides local exchange service to more access lines than ACS and that GCI represents the largest telecommunications provider in Alaska.[36]

However, the Commission's "comparable" analysis does not turn on a mere calculation of lines served or company size. The fact that GCI may offer the same or similar services as ACS has no bearing on whether it occupies the overwhelmingly dominant (*i.e.*, monopoly) position in the market comparable to incumbent carriers at the time of the 1996 Telecommunications Act. As the Commission previously explained, incumbent carriers at that time possessed "economies of density, connectivity, and scale that ma[d]e efficient competitive entry *quite difficult, if not impossible*."[37] Due to their government-sanctioned monopolies, the incumbents deployed facilities knowing that they would receive an adequate rate of return from subscribers in their captive markets.[38] Complete control over existing infrastructure allowed incumbents "to serve new customers at a much lower incremental cost than a facilities-based entrant that must install its own switches, trunking and loops to serve its customers."[39] Without interconnection between the incumbent and the new entrant, new entrant subscribers "would be unable to complete calls to subscribers served by the incumbent LEC's network."[40] Incumbents

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35 ACS Petition at 11.

36 *Id.* at 11-12.

37 *GTA NPRM* at ¶ 26 (emphasis added). *See Mid-Rivers NPRM* at ¶ 6 (same); *Channel Islands Order* at ¶ 8 (same).

38 *Local Competition Order* at ¶ 1 ("State and federal regulators devoted their efforts over many decades to regulating the prices and practices of these monopolies and protecting them against competitive entry.").

39 *Id.* at ¶ 10. *See GTA NPRM* at ¶ 32 ("[T]he existing infrastructure of the incumbent LEC in an area enables the incumbent LEC to serve new customers therein at a much lower incremental cost than a facilities-based entrant.").

40 *Local Competition Order* at ¶ 10.

had no economic incentive to assist new entrants and "had the ability to discourage entry and robust competition by . . . insisting on supracompetitive prices or other unreasonable conditions."[41] As a result, Section 251(h)(2) does not ask whether a competitive carrier is comparable to an ILEC as it operates now, but rather whether a competitive carrier has achieved a market presence comparable to that which incumbents possessed at the time of the 1996 Telecommunications Act. This requires a showing that the competitive carrier holds a government-sanctioned monopoly (or its equivalent) and exercises near-complete, non-transient control over the facilities and prices in an area to warrant ILEC regulatory controls.

The ACS Petition does not show that GCI occupies a position anywhere near the overwhelming dominance exercised by incumbents at the time of the 1996 Telecommunications Act. GCI was not an incumbent carrier at the time of the 1996 Telecommunications Act and has never held the durable, government-sanctioned monopoly possessed by incumbents for decades prior to deregulation. ACS does not demonstrate or even suggest that GCI operates at such economies of density, connectivity, and scale to render competitive entry impossible or even difficult.[42] In fact, the ACS Petition indicates that competition is alive and well in the study area. ACS states that "today competition has taken hold in substantially all of the ACS of Anchorage study area."[43] ACS further states that not only do "telephone exchange service customers today have a choice among service providers" in the study area, but "service providers have a sufficient customer base to find an effective market for their offerings."[44]

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41 *GTA NPRM* at ¶ 32. *See Local Competition Order* at ¶ 10 (stating incumbent carriers could "insist[] on supracompetitive prices or other unreasonable conditions for terminating calls from the entrant's customers to the incumbent LEC's subscribers"); *Mid-Rivers Order* at ¶ 26 (noting such power allowed incumbent carriers "to raise and maintain prices above the competitive level without driving away so many customers as to make the increase unprofitable").

42 *See supra* note 37.

43 ACS Petition at 9.

44 *Id*.

ACS's own statements thus reveal that GCI does not wield the power to raise prices for its services to residential and commercial customers significantly over a long period or foreclose market entry comparable to incumbent carriers at the time of the 1996 Telecommunications Act.

ACS also fails to show that GCI exercises such control over existing infrastructure that it can deny consumers access or charge them unreasonable prices in the study area. ACS claims that GCI provides local exchange service to more lines than ACS and can reach 99 percent of customer locations in the study area.[45] But such evidence provides no indication that GCI has market dominance under Section 251(h)(2) – or for that matter under any standard competition market analysis. For example, the Commission previously imposed ILEC obligations on carriers when they either held sole control over the local exchange facilities or provided local exchange service to nearly all access lines in an area almost entirely over their own facilities and the incumbent had effectively ceded the market.[46] GCI does not meet either of these standards. GCI never possessed sole control over infrastructure in the study area, in contrast to an incumbent carrier at the time of the 1996 Telecommunications Act. GCI instead built its network over time without the protections of a government-sanctioned monopoly or the guarantee of a return on its investments. ACS, in fact, admits that GCI and it have a comparable facilities-based presence throughout the study area.[47] In addition, although GCI may serve more lines than ACS, it serves many of those lines through facilities leased from ACS.[48] ACS therefore fails to demonstrate that GCI exercises control over facilities in the study

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45 *Id.* at 11.

46 *See GTA NPRM* at ¶ 27 (recognizing GTA as the "sole provider of local exchange and exchange access services on Guam"); *Mid-Rivers Order* at ¶ 2 (noting that Mid-Rivers served 93 percent of the access lines in the exchange largely over its own facilities").

47 ACS Petition at 11.

48 *Id*.

area comparable to the power wielded by incumbent carriers at the time of the 1996 Telecommunications Act.

ACS also fails to show that GCI demands supracompetitive prices or other unreasonable conditions from consumers or competitors. In fact, the ACS Petition is devoid of any discussion of GCI's prices. The Commission previously found that "[t]he existence of a second set of facilities is closely related to the issue of whether [a carrier] has sufficient market power to raise rates."[49] Here, ACS operates its own facilities and serves tens of thousands of lines in the study area.[50]

Finally, ACS offers no explanation for why it cannot use its facilities to respond to GCI's market advances through competitive pricing and advanced service offerings. Instead, ACS asks the Commission to reward its lack of diligence and innovation by imposing unwarranted ILEC regulatory obligations on its competitor. Of course, the Commission should reject that position out of hand. The Commission instead should find that GCI does not occupy a position comparable to incumbent carriers at the time of the 1996 Telecommunications Act and dismiss the ACS Petition.

B. GCI Has Not "Substantially Replaced" an Incumbent Carrier in the Study Area

The Commission may designate a carrier as an ILEC under Section 251(h)(2) only if such carrier has "substantially replaced an incumbent local exchange carrier" as defined at the time of the 1996 Telecommunications Act.[51] But the ACS Petition fails to demonstrate that GCI substantially replaced ACS as the incumbent carrier in the study area. Echoing its arguments regarding GCI's "comparability" to incumbents discussed above, ACS claims that GCI

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49 *Mid-Rivers Order* at ¶ 12, n. 39.

50 ACS Petition at 11.

51 47 U.S.C. § 251(h)(2)(B).

substantially replaced it because GCI "offers more services . . . to more customer locations within the study area than does ACS."[52] In support of its claim, ACS notes that GCI garnered 60 percent of the wireline telephone exchange service subscribers in the study area and that 99 percent of customers "have the ability to order" telephone exchange service from GCI.[53] ACS suggests that the Commission found substantial replacement where "most" customers were served by a new entrant "mostly" over the new entrant's facilities.[54] ACS also points to the fact that GCI is larger than ACS in terms of employees and revenues, and performs its own network maintenance, repairs, and upgrades.[55]

ACS misstates the relevant standard for substantial replacement under Section 251(h)(2). The Commission has repeatedly held that substantial replacement only occurs when "the LEC at issue provides local exchange service to all or virtually all of the subscribers in an area."[56] Thus, it is not enough that a competitive carrier serve "most" subscribers "mostly" over its own facilities as ACS suggests, the carrier instead must be the overwhelmingly dominant service provider in an area to potentially deserve ILEC treatment. The Commission has rarely found substantial replacement, and only where the carrier was the sole (or effectively the sole) service provider, obtained a sufficiently high market share (*i.e.*, 85 to 93 percent), and requested that it "supplant" the existing incumbent in an area.[57] By contrast, where the competitive carrier

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52 ACS Petition at 14.

53 *Id.* at 13.

54 *Id.* at 12.

55 *Id.* at 14.

56 *GTA NPRM* at ¶ 31. *See Mid-Rivers Order* at ¶ 15 ("[S]ection 251(h)(2)(B) is satisfied when the LEC at issue provides local exchange service 'to all or virtually all' of the subscribers in the service area."); *Channel Islands Order* at ¶ 11 (same).

57 *GTA NPRM* at ¶¶ 28, 31 (discussing GTA's position as sole service provider in Guam); *Mid-Rivers Order* at ¶ 30 (noting Mid-Rivers possessed an 85 to 93 percent market share while the current incumbent held a corresponding 7 to 15 percent market share). The "substantial replacement" standard differs from – and is a much higher bar than – the very stringent conditions the statute established and the Commission through decisions has implemented and elaborated upon in providing for forbearance pursuant to Section 10 of the Communications Act. 47 U.S.C. §

is not the overwhelmingly dominant service provider in an area, the Commission will not find substantial replacement.[58] Requiring an "extraordinarily high level of subscribership" for substantial replacement, while not sufficient in and of itself, is consistent with the goals of 1996 Telecommunications Act in fostering competition and imposing ILEC regulation only when a carriers possess such dominant market power to control the prices and services provided in an area.[59] However, unless the Commission finds that a competitive carrier effectively "takes the place of" an incumbent in an area, it may not treat the carrier as an ILEC under Section 251(h)(2).[60] Where a competitive carrier enters a market already served by an incumbent, the competitive carrier "would not *replace* that [incumbent] service but would rather be offering complementary service."[61]

GCI operates as ACS's competitor, not its replacement. Even assuming ACS is correct that GCI is larger than ACS and provides more services to more customers, it does not meet Section 215(h)(2)'s high benchmark of controlling the wireline telephone exchange service market. The fact that 99 percent of customers may order telephone exchange service from GCI is a measure of network coverage, not whether it has overwhelming market dominance. ACS reaches virtually this same customer base. In any event, GCI's reported 60 percent market share of traditional voice exchange service is a mere snapshot and is nowhere near the share possessed by an incumbent at the time of the 1996 Telecommunications Act. The Commission has never indicated that obtaining a majority market share alone is sufficient to trigger ILEC

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160. As discussed later in these comments, should it believe that the Anchorage market has become sufficiently competitive and it meets the rigorous requirements of Section 10, ACS can file a petition for forbearance to obtain regulatory relief. *See infra* Section VII.

58 *Channel Islands Order* at ¶ 11.

59 *Mid-Rivers Order* at ¶ 12.

60 *GTA NPRM* at ¶ 28 ("The word 'replace' can mean 'to take the place of: serve as a substitute for or successor of'"). *See Mid-Rivers Order* at ¶ 15, n. 44 ("'replace" is defined as 'to assume the function of; substitute for'").

61 *Channel Islands Order* at ¶ 11 (emphasis in original).

designation and should not start now.[62] GCI has not taken the place of ACS in the study area – ACS still exists and operates its own facilities to offer services that compete with GCI's offerings.[63] ACS notes that GCI's operations mean that consumers have a "choice" among service providers in the study area.[64] But the option to choose another provider besides ACS does not mean that ACS has been substantially replaced as an incumbent for the purposes of Section 251(h)(2), only that it is subject to competition in the study area. Such competition among carriers providing complementary services is exactly what Congress had in mind when it adopted the deregulatory provisions of the 1996 Telecommunications Act.[65] This competition will be undermined, both in Alaska and across the country, if the Commission begins to treat competitive carriers as ILECs just because they surpass the existing incumbent as the largest service provider in an area. The Commission therefore should find that GCI has not substantially replaced an incumbent carrier in the study area and reject the ACS Petition.

C. Treating GCI as an ILEC would be Inconsistent with the Public Interest, Convenience, and Necessity as well as the Purposes of Section 251

Treating GCI as an ILEC would not be consistent with the public interest, convenience, and necessity or the purposes of Section 251.[66] ACS claims that the Commission should designate GCI as an ILEC because "[c]ompetitors may very well be more interested in access to the GCI's more advanced and broadly distributed network than in ACS's network with its more

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62 ACA notes that ACS's data show that GCI is often a minority service provider in many areas of Alaska. *See* ACS Petition, Declaration of Beth R. Barnes on behalf of Alaska Communications at ¶ 8 (showing GCI with a 34 percent market share for business and residential voice service statewide).

63 ACS Petition at 11.

64 *Id.* at 9.

65 *See supra* at 10-12.

66 47 U.S.C. § 251(h)(2)(C).

limited capabilities."[67] ACS further asserts that imposing resale, interconnection, collocation, and other ILEC regulatory obligations on GCI is necessary because "a carrier's incentive to unlawfully discriminate grows with the size of a carrier's 'footprint' in the market."[68]

ACS provides no evidence to support its speculation regarding outside demand for GCI's network or the potential for unlawful discrimination, and the Commission should summarily reject such unsupported claims. ACA notes that GCI maintains only a marginally larger (*i.e.*, 60 percent) "footprint" in the study area than its competitors,[69] and the ACS Petition contains no allegation of unlawful discrimination by GCI necessitating Commission intervention. More importantly, treating GCI as an ILEC would undermine the public interest in reducing regulation of non-incumbent carriers and Section 251's overall goal of fostering competition. As the Commission previously explained, treating a carrier as an ILEC may serve the public interest and the purposes of Section 251 when such action "is a prerequisite for the development of competition in the local exchange and exchange access markets" or necessary to "foster competition that otherwise would not likely develop."[70] As with the Commission's "comparability" and "substantial replacement" analyses discussed above, "the public interest analysis required by section 251(h)(2)(C) addresses matters related to the role of incumbency

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67 ACS Petition at 15.

68 *Id.* at 15-16.

69 *Id.* at 13. *See id.* at 11 (stating that GCI holds a market position similar to ACS in the Anchorage study area).

70 *GTA NPRM* at ¶ 41.

under section 251."[71] The Commission therefore will not impose ILEC "market opening" requirements on a competitive carrier in an area where effective competition already exists.[72]

As discussed above, treating GCI as an ILEC is not necessary to develop or foster competition in the study area's local exchange and exchange access service markets. In its Petition, ACS concedes that ACS and GCI can and do compete for customers in the study area and that each carrier has found "an effective market for their offerings."[73] Unlike prior situations where the Commission imposed ILEC treatment in the public interest, nothing in the record indicates that GCI will discriminate against competitors if it is not subject to the resale, interconnection, colocation, or other ILEC regulatory obligations.[74] In fact, given the presence of ACS and others in the market, GCI would engage in these acts at its competitive peril.

By contrast, treating GCI as an ILEC would undermine the public interest by subverting decades of U.S. competition policy that refrains from subjecting non-incumbents to price controls and other regulation.[75] Subjecting competitive carriers to ILEC regulatory obligations will discourage efforts to deploy additional facilities, improve existing services, and develop

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71 *Mid-Rivers Order* at ¶ 17. ACA also notes that the public interest requirement is in addition to, and not separate from, the other statutory criteria for ILEC treatment under Section 251(h)(2). *See* 42 U.S.C. § 251(h)(2) (stating the statutory criteria are conjunctive, not in the alternative). Consequently, because GCI neither occupies a position "comparable" to an incumbent carrier at the time of the 1996 Telecommunications Act nor "substantially replaced" an incumbent carrier in the study area, it axiomatically does not serve the public interest or the purposes of Section 251 to treat GCI as an ILEC. *See Channel Islands Order* at ¶ 12 (finding public interest evaluation unnecessary where Commission already found that competitive carrier failed to meet the other Section 251(h)(2) criteria).

72 *Mid-Rivers Order* at ¶ 18.

73 ACS Petition at 9.

74 *See GTA Order* at ¶ 3 (stating that public interest supported treating sole service provider GTA as an ILEC because otherwise GTA "could permanently avoid the interconnection, unbundling, resale, and other obligations" necessary for effective competition); *Mid-Rivers Order* at ¶ 19 ("Absent our decision to treat Mid-Rivers as an incumbent LEC for purposes of section 251, a new competitive LEC seeking to serve the Terry exchange would be permanently foreclosed from obtaining interconnection, unbundled network elements or other offerings mandated by section 251(c) from Mid-Rivers.").

75 *See supra* at 10.

more advanced offerings. Rather than promoting the public interest, treating GCI as an ILEC will impede the public's ability to access GCI's innovative, better-quality services in the Anchorage area and stifle further competition. Nothing in Section 251 or the public interest suggests the Commission should punish GCI for its successes, particularly when such successes were earned in a competitive market without the benefits of incumbency.

The Commission therefore should dismiss the ACS Petition and send a clear message that it will not entertain attempts by incumbents to impose unwarranted regulatory obligations on their competitors and that any plea to impose incumbency on a competitor must demonstrate the competitor has exclusive monopoly-like status and exceptionally dominant and durable control of the market. This will prevent the Commission from being inundated with requests to designate competitive carriers as ILECs in areas because these carriers have gained a predominant share of the market due to their drive and innovation – or the ineptitude of the incumbent. Such requests will tie up Commission time and resources while suppressing competition in Alaska and beyond.

VI. AS A POLICY MATTER, ACS'S POSITIONS ARE NONSENSICAL

ACS's attempt to redefine the standards for treating competitive carriers as ILECs under Section 251(h)(2) will lead to absurd policy results if successful. First, although the ACS Petition's focus is limited to the ILEC treatment of GCI, there is no reason why its rationale would not equally apply to multiple competitive carriers in the same area if followed to its logical conclusion. ACS claims that GCI should be treated as an ILEC because GCI provides the same or similar services as ACS, holds a larger market share than ACS, and offers more advanced services than ACS over a network that competitors may wish to access.[76] However, one can imagine an area where multiple carriers offer the same or similar services, exercise relatively

[76] ACS Petition at 10-17.

equal market shares, and control advanced networks that competitors may wish to access. Most observers would call that a competitive market, where no government intervention is warranted. ACS appears to take a contrary view.

Under ACS's proposal, the Commission would be forced to treat each of these carriers as ILECs under Section 251(h)(2) because they exercise the same or superior market power as the current incumbent. But the Commission previously expressed concern with designating multiple ILECs in an area, particularly in regards to administering universal service, "as those rules are predicated on a single incumbent LEC per study area."[77] The Commission also noted that such a result leaves open the question of whether a "legacy" incumbent carrier should be considered a competitive carrier or an ILEC for the purposes of the Commission's access charge rules.[78] The ACS Petition does not address these concerns, glossing over complex ILEC transitional issues in a single paragraph.[79] ACS's arguments also divorce the ILEC designation from the status of incumbents at the time of 1996 Telecommunications Act. As discussed above, a single incumbent with a government-sanctioned monopoly exercised near-complete control over the facilities and services in an area at the time of the 1996 Telecommunications Act. Neither the 1996 Telecommunications Act generally nor Section 251(h)(2) specifically contemplated multiple ILECs operating in the same area. In fact, the statute promotes the opposite approach of first targeting the dominant, incumbent provider for oversight and then forbearing from such incumbent regulation as competition develops.[80] The Commission's focus therefore should be on removing incumbent obligations from carriers in competitive markets, not creating new ILECs.

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77 *Mid-Rivers NPRM* at ¶ 14 (citing 47 C.F.R. § 54.307).

78 *Id*.

79 ACS Petition at 18.

80 *See supra* at 5.

Second, the ACS Petition ignores the dynamic nature of the markets for telecommunications services. As exemplified in the study area, competitive carriers may surpass incumbents in market share and facilities in a relatively short time period. But without a durable, government-sanctioned monopoly (or its equivalent) like that held by incumbents at the time of the 1996 Telecommunications Act, such advancements could be short-lived as competitors jockey for subscribers. Under ACS's approach, the Commission would need to constantly intervene to shift regulatory ILEC obligations as competitors gained and lost market share. Such shifts can occur frequently in highly competitive markets. Section 251(h)(2) does not authorize market micromanaging by the Commission, which would foster disputes and impede competition as carriers file petitions and counter-petitions seeking to impose ILEC regulatory obligations on their competitors. Once again, the ACS Petition does not address how the Commission would handle such issues. The Commission therefore should avoid the absurd policy implications of ACS's proposals and dismiss the Petition.

VII. ACS CAN AND MUST FILE A PETITION FOR FORBEARANCE TO DISCHARGE ITS ILEC OBLIGATIONS

The ACS Petition improperly requests that the Commission relieve ACS of its regulatory obligations as an ILEC.[81] ACS claims such relief is necessary if the Commission treats GCI as the ILEC in the study area.[82] But as discussed above, the ACS Petition fails to demonstrate that GCI meets any of the criteria warranting potential treatment as an ILEC under Section 215(h)(2). However, assuming *arguendo* that GCI did meet the criteria for ILEC designation, ACS still must file a separate petition for forbearance under Section 10 of the Communications Act in order to discharge its ILEC obligations.[83] The Communications Act does not specify the

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81 ACS Petition at 16.

82 *Id*.

83 47 U.S.C. § 160 (authorizing the Commission to forbear from enforcing any regulation or statutory provision when enforcement is unnecessary: (1) to ensure that charges, practices, classifications, or regulations by carriers are just and reasonable and are not unjustly or

proper framework for the regulatory treatment of "legacy" ILECs.[84] Contrary to ACS's assertions, Section 251 "does not provide for removal or modification of incumbent LEC status in the event that another LEC has effectively replaced the original legacy incumbent LEC."[85] Thus, even if a current ILEC demonstrates that a competitive carrier should be treated as a new ILEC in the area under Section 251, "this does not appear to change the status of the legacy incumbent LEC automatically and convert the . . . incumbent LEC into a competitive LEC."[86] Instead, the legacy incumbent must file a separate petition satisfying the "rigorous standard" for forbearance set forth in Section 10 of the Communications Act before the Commission will discharge its ILEC obligations.[87] ACS has not yet filed a separate petition for forbearance in accordance with Section 10 of the Communications Act. The Commission therefore must reject ACS's request to discharge its ILEC regulatory obligations.[88]

VIII. CONCLUSION

The ACS Petition is contrary to basic economic and competition principles supporting the elimination or streamlining of non-incumbent carrier regulation. ACS fails to show that GCI exercises the overwhelmingly dominant market power an incumbent possessed at the time of the 1996 Telecommunications Act warranting ILEC treatment. If successful, the ACS Petition

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unreasonably discriminatory; (2) for the protection of consumers; and (3) to advance the public interest).

84 *Mid-Rivers Order* at ¶ 22.

85 *Id*.

86 *Id*.

87 *Mid-Rivers NPRM* at ¶ 15 (discussing the "rigorous" forbearance standard under Section 10 of the Communications Act). *See Mid-Rivers Order* at ¶ 24 (declining to discharge the legacy incumbent's ILEC regulatory obligations in the absence of a separate petition for forbearance).

88 ACS also argues that it should be relieved of its ILEC regulatory obligations so that it may invoke the protections of Section 224 of the Communications Act regarding access to poles, ducts, conduits, and rights-of-way controlled by utilities. ACS Petition at 16-17 (citing 47 U.S.C. § 224). ACS provides no explanation for why Section 224 relieves it of its obligation to file a separate petition for forbearance to discharge its ILEC regulatory obligations. As a result, the Commission must dismiss ACS's attempt to circumvent the Commission's forbearance procedures.

will lead to absurd policy results and encourage other incumbents to file similarly baseless requests to impose ILEC regulatory obligations on their competitors. The Commission therefore should dismiss the ACS Petition and take this opportunity to establish a high bar for future requests seeking to impose Section 251 incumbent obligations on a competitive provider by requiring the requestor to demonstrate that a competitor has exclusive monopoly-like status and exceptionally dominant and durable control of the market.

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